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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 563.

DELAWARE RIVER JOINT TOLL BRIDGE COMMISSION,
PENNSYLVANIA-NEW JERSEY,

Petitioner,

v.

JOHN D. COLBURN and BESSIE COLBURN,

Respondents.

BRIEF FOR RESPONDENTS

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IN THE
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DELAWARE RIVER JOINT TOLL BRIDGE
COMMISSION, PENNSYLVANIA-NEW JERSEY,
Petitioner,

v.

JOHN D. COLBURN and BESSIE COLBURN,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW JERSEY
COURT OF ERRORS AND APPEALS

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the New Jersey Supreme Court (R., p. 9) is reported in 119 N. J. L. 600; 157 Atl. 896. The opinion of the New Jersey Court of Errors and Appeals (R., p. 209) is reported in 123 N. J. L. 197; 8 Atl. (2d) 563.

Jurisdiction

The judgment of the New Jersey Court of Errors and Appeals was entered September 22, 1939. The petition for writ of certiorari was filed November 30, 1939, and was

granted January 15, 1940 with the direction: "The Court directs the attention of counsel to the question of the jurisdiction of this Court."

It is the contention of respondents that this Court lacks appellate jurisdiction to review the decision of the New Jersey Court of Errors and Appeals. First, the compact does not surrender New Jersey's sovereignty as to jurisdiction of its courts over eminent domain proceedings, but provides a method of proceeding according to a New Jersey statute so that the only question presented is the review of a New Jersey statute as interpreted by the New Jersey Court of Errors and Appeals. Second, the meaning and application of an interstate compact does not present a federal question. (a) The compact clause was not intended to make the Supreme Court an arbiter with respect to compacts. (b) *People v. Central Railroad*, 12 Wall. 455, compels the conclusion that the interpretation by a State Court of a compact does not present a federal question and (c) other cases in this Court dealing with interstate compacts are not at variance with *People v. Central Railroad, supra*. Third, assuming a federal question is presented, there is no showing that a federal question was presented for decision to the New Jersey Court of Errors and Appeals. These jurisdictional points are covered by the first three points of the Argument in this Brief.

Question Presented

Apart from the jurisdictional questions heretofore set forth the question at issue is: Is a property owner whose property is not taken but who has suffered consequential damages as the result of the building and construction of an interstate bridge by the Delaware River Joint Toll Bridge Commission entitled to recover for the said damages by virtue of the legislation governing the building of such a bridge?

Statutes Involved

The Delaware River Joint Toll Bridge Commission was created by statutes enacted by the New Jersey legislature (P. L. 1934, Ch. 215, now R. S. 1937, 32:8-1, *et seq.*); by the Pennsylvania legislature (1931, Act No. 332, P. L. 1352; 1933, Act No. 138, P. L. 827); and consented to by Congress (1935, Public—No. 411—74th Congress). This compact empowered the Bridge Commission to build bridges, gave to it the right to acquire real property and exercise the power of eminent domain. The term “real property” as defined by Article III of the Compact, includes “claims for damage to real estate”. Paragraph 3 of Article III likewise provides for the manner in which the power of eminent domain is to be exercised. It enacts that if the Commission cannot agree with an owner of real property in New Jersey it shall proceed:

“in the manner provided by the Act of the State of New Jersey, entitled ‘an Act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware River; and providing free travel across the same; approved the first day of April, one thousand nine hundred and twelve (Chapter two hundred ninety-seven), and the various acts amendatory thereto, relating to the acquisition of inter-State toll bridges over the Delaware River.’”

The New Jersey legislation (P. L. 1912, Ch. 297 as amended by P. L. 1919, Ch. 76; now R. S. 1937, 32:9-1, *et seq.*) referred to provides that if the Commission cannot agree with an owner as to compensation it shall appoint a time and place to meet upon the property and view the same and “the premises affected thereby” and further provides notice shall be given to “persons affected” and then continues:

"The joint commission, having viewed the premises or examined the property, shall hear all parties interested and their witnesses, and shall estimate the value of the property taken, including any easements, rights or franchises incident thereto as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable."

Statement of Case

John D. and Bessie Colburn own a modern dwelling house at 99 North Main Street, Phillipsburg, New Jersey. Before the building of a bridge abutment to the rear of their home by the Delaware River Joint Toll Bridge Commission, their property constituted an integral part of the North End section of Phillipsburg. On the East, their property faced a high natural hill; on the West, while there were buildings between their property and the Delaware River, they enjoyed, because of the space between, and the varying heights of the irregular structures, a reasonable amount of light, ventilation and a view of the Delaware River, and the hill on the opposite side of the River. Further, by reason of the existence of seven separate thoroughfares, they had ready access to the entire section.

The Bridge Commission built an approach to the rear of the Colburn house. They caused the seven thoroughfares to be closed in whole or in part. The approach is one thousand feet long; ascends from street level to a height of forty feet where it meets with the bridge crossing the Delaware. It consists of solid dirt fill. The effect was to isolate completely the Colburn property in an artificially created valley. Access to the railroad, the river and the West is cut off. The abutment curtails light, ventilation and view. The Colburn property was thus depreciated in value.

The Colburns, in their application to the New Jersey Courts, contended that the injury to their property was

compensable by reason of the express provisions of the New Jersey Statutes. Chapter 215 of the Laws of 1934, now R. S. 1937, 32:8-1, gives to the Bridge Commission the right to acquire property, defines "property" as including "claims for damages to real estate", and further provides as to New Jersey property, that eminent domain proceedings shall be pursued in accordance with the provisions of Chapter 297 of the Laws of 1912 as amended by Chapter 76 of the Laws of 1919, now R. S. 1937, 32:9-1, *et seq.*, which specifically sets out that the Commission should view "premises affected", notify "persons affected" and award damages for "property taken, injured or destroyed", and "state to whom the damages are payable".

The Colburns, with some of their neighbors, applied to the New Jersey Supreme Court in October, 1937, for a rule to show cause why a writ of mandamus compelling the Commission to proceed to estimate the damages should not issue. The rule was granted. The matter was argued upon stipulated facts and exhibits before the January, 1938, Term of the New Jersey Supreme Court. No federal question was raised by the Commission either in its stipulation, brief or argument to the Court. In March, 1938, the New Jersey Supreme Court ruled that alternative writs of mandamus should issue. The Court suggested the joinder of all owners as co-relators was probably improper and confusing. An order was entered awarding alternative writs to each of the owners. The embankment to the rear of Colburns' property and that of four other relators is approximately thirty-five feet high, and the Colburn case, as typical of that group, was prosecuted.

The Bridge Commission filed an answer to the alternative writ, and subsequent pleadings were filed (R., pp. 14, *et seq.*). No federal question was raised by the pleadings or at the trial. The fact issues were tried at Circuit, before a judge and jury. The findings were certified by postea to the New Jersey Supreme Court (R., pp. 24, *et seq.*) which

entered judgment (R., pp. 29, *et seq.*), directing the issuance of a peremptory writ. The Bridge Commission then appealed to the New Jersey Court of Errors and Appeals. Its grounds of appeal (R., pp. 1, *et seq.*) raised no federal question, nor was such question argued to the court which thereafter affirmed the judgment of the Supreme Court. The opinion (R., pp. 209, *et seq.*) neither presents nor decides a federal question. The first time petitioner attempted to raise a "purported" federal question is in this proceeding.

ARGUMENT

I

The Court is without jurisdiction because the question presented for review is the construction of a state statute.

The interstate compact (U. S. 1935, Public—No. 411—74th Congress as set forth in Petitioner's petition, pp. 8, etc.) being joint legislation of each State, provides in Article II that the Commission shall have the general powers "(j) To acquire, own", etc., "real property * * *", and "(m) To exercise the power of eminent domain." Article III of the compact enacts specifically the method the Commission shall acquire real property and exercise the power of eminent domain. Paragraph 3 of Article III (Petitioner's petition, p. 12) specifically states that if the Commission cannot agree with an owner as to the terms of acquisition, the Commission can then acquire real property by the exercise of the right of eminent domain "in the manner provided by the Act of the State of New Jersey, entitled 'An act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of Pennsylvania, of toll bridges across the Delaware River; and providing for free travel across the same', approved the first day of April, one thousand nine hundred and twelve (Chapter two hun-

red ninety-seven), and the various acts amendatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River."

In other words, both States by a compact consented to by Congress; agreed that as far as New Jersey property was concerned, compensation should be made in accordance with the provisions of a New Jersey statute enacted by the New Jersey Legislature in 1912 (P. L. 1912, Chapter 297) as amended by P. L. 1919, Chapter 76 (now Revised Statutes of 1937, 32:3-6). This statute is not part of an inter-state compact. It provides that if the Commission cannot agree with an owner as to compensation, "The said Commission shall appoint a time not less than twenty nor more than thirty days therefrom, when they shall meet upon the property and view the same, and the premises affected thereby; and shall give at least ten days personal notice of the time and place of the first meeting of the Attorney General of this State, and to the president, secretary or director of any corporation, stock company or to any partnership or persons affected * * *", and then continues:

"The joint commission, having viewed the premises or examined the property, shall hear all parties interested and their witnesses, and shall estimate the value of the property taken, including any easements, rights or franchises incident thereto as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable."

It was this New Jersey statute on which the New Jersey Court of Errors and Appeals relied (R. p. 209). It was this New Jersey statute and its interpretation on which the Supreme Court originally allowed mandamus (R. p. 9), on which the alternative writ was predicated (R. p. 14), on which judgment that a peremptory writ issue was based (R. pp. 29-31).

It is of course fundamental that in the absence of a compact governing the situation at hand the State of New Jer-

sey would have exclusive jurisdiction as to eminent domain, proceedings with respect to land within the State. Did the State of New Jersey surrender its jurisdiction by virtue of the compact? The inquiry is much the same as that raised in *The People v. Central R. R. of N. J.*, 42 N. Y. 283 at 294 (writ of error dismissed 12 Wall. 455):

"* * * The right of absolute sovereignty, which includes all the power of government, all the authority, executive, judicial and legislative, which the several States possess and exercise, subject to the constitutional supremacy of the national government, doubtless belongs to New Jersey, over the domain and territory of said State. This right of governmental control may doubtless be modified by compact between the States. And this brings us to the inquiry, how far, if at all, the State of New Jersey had made a binding provision by treaty for the cession and extinguishment of any of her territorial or governmental rights to the State of New York, over the waters or land referred to in said treaty * * *."

Certainly there is nothing in the compact under review which surrenders New Jersey's jurisdiction as to acquisition of real property within the State. The Compact grants the Commission the right of eminent domain. But it prescribes the method of exercise. It directs that property shall be acquired pursuant to a New Jersey Statute. And the New Jersey Court of Errors and Appeals has construed this Statute.

It is, of course, elementary, that the interpretation of a State Statute, does not present a federal question for review by the Supreme Court of the United States.

Adams v. Russell, 229 U. S. 353;

Kenney v. Craven, 215 U. S. 125.

It is submitted that by the Compact the State did not relinquish its right to control through its Courts eminent

domain proceedings with respect to property within its jurisdiction; that the State Court at most construed a State Statute which both States agreed should be controlling as to the acquisition of real property within New Jersey.

II

The meaning and application of an interstate compact does not present a Federal question.

Petitioner in its Brief has set forth the proposition that the "meaning and application of an interstate compact presents a federal question for ultimate adjudication by this Court." This proposition is unsound. Neither the history surrounding the inclusion of the compact clause as part of the Constitution, nor the cases cited by Petitioner, nor the reported cases support such a proposition.

A. The Compact clause does not make the Supreme Court the final arbiter with respect to the interpretation of interstate compacts.

The words of the framers of the Constitution were simply that—

"No state shall, without the Consent of Congress * * * enter into any agreement or Compact with another State * * * " U. S. Constitution, Art. I, Sec. X, Cl. 3.

At the most the Constitution requires Congressional consent to an agreement between States. Executive sanction or judicial interpretation are not requisites. The clause is not a grant of power, but a qualified prohibition.

The purpose of including the clause in the Constitution is well set forth by Mr. Justice Felix Frankfurter and James M. Landis in an article "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale Law Journal 685 (1925) at pages 694-695 as follows:

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"Historically the consent of Congress, as a prerequisite to the validity of agreements by States, appears as the Republican transformation of the needed approval by the Crown. But the Constitution plainly had two very practical objectives in view in conditioning agreement by States upon the consent of Congress. For only Congress is the appropriate organ for determining what arrangements between States might fall within the prohibited class of 'Treaty, Alliance, or Confederation', and what arrangements come within the permissive class of 'Agreement or Compact'. But even the permissive agreements may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved. Therefore, Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The framers thus astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interest."

Mr. Justice Fuller in *Virginia v. Tennessee*, 148 U. S. 503, at 519 expresses the purpose of the clause as follows:

"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States, * * *."

The original intent of the framers of the Constitution was to guard against alliances which might threaten the Union. Congress was specifically chosen as the agency of the federal government to supervise such compacts. No grant of supervisory power was vested in the Supreme Court. Once Congress has approved of the Compact, the demands of the Constitution were completely met.

B. This Court in *People v. Central Railroad*, 12 Wall. 455, has held that the adjudication by the highest State Court as to the meaning of an interstate Compact does not present a Federal question.

In *People v. Central Railroad*, *supra*, New York sought a review of a decision of its own Courts which held that an interstate Compact had not vested in New York jurisdiction over certain lands bordering on the New Jersey shore with respect to which the Central Railroad was alleged to have committed a nuisance. This Court held that on a motion to dismiss for want of jurisdiction the Respondent should prevail. That the case concerned the interpretation of an interstate Compact is conclusively indicated by an examination of the opinion of the New York Court of Appeals. *People v. Central R. R. Co.*, of N. J., 42 N. Y. 283.

In *Hinderlider v. LaPlata River and Cherry Creek Ditch Co.*, 304 U. S. 92, this Court refused to entertain jurisdiction on the ground that the interpretation of an interstate Compact presented a Federal question. Jurisdiction was specifically predicated on a question of "Federal common law"—whether the water of an interstate stream must be apportioned between States. The Court, in a footnote at page 110, said:

"The decisions are not uniform as to whether the interpretation of an interstate compact presents a Federal question. Compare *People v. Central Railroad*, 12 Wall 455, with *Wedding v. Meyler*, 192 U. S. 573, and *Wharton v. Wise*, 153 U. S. 155."

As has been set forth herein, *People v. Central Railroad*, *supra*, definitely holds that the interpretation of an interstate compact does not present a Federal question justifying a review by this Court. And it is submitted that the two further cases cited are not at variance with this hold-

ing. *Wharton v. Wise*, *supra*, is clearly distinguishable. There this Court had before it on appeal, from a dismissal of a writ of *habeas corpus* granted by a lower Federal Court, the question of the effect of an agreement between Maryland and Virginia entered into by both States in 1785, before the adoption of the Constitution. The agreement of both States had never been assented to by the Congress of the Confederation or by Congress under the Constitution. The Court held that the agreement was not prohibited by the Articles of Confederation as not being a treaty, confederation or alliance as used in the Articles. It further held that the agreement between the two States was not affected by the Constitution since the contract clause applied only to future agreements or contracts. Thus, there is no decision to the effect that the interpretation of an interstate Compact presents a Federal question.

Wedding v. Meyler, *supra*, likewise is distinguishable. This Court had before it a decision of the highest Court of Kentucky holding that an Indiana judgment based on a summons served on the Ohio River on the Kentucky side was not entitled to full faith and credit in a suit in Kentucky on the Indiana judgment. Kentucky had been formed out of territory formerly belonging to Virginia. Virginia in 1789 had enacted a statute proposing the erection of the district of Kentucky into an independent State upon several enumerated conditions among which was that "The respective jurisdictions of this Commonwealth and of the proposed State on the river as aforesaid, shall be concurrent only with the States which may possess the opposite shores of the said river." Congress by a separate act allowed for the admission of Kentucky as a separate State. These two acts, the enabling legislation by Virginia and the Act of Congress, this Court said made mandatory a recognition of the jurisdiction set forth in the Virginia Statute. This Court reversed the judgment of the Kentucky Court. At least three grounds may be found justifying the Court's taking appellate jurisdiction. First, there was presented a

decision of the highest State Court of Kentucky failing to give full faith and credit pursuant to the Constitution to a judgment of the Indiana Court. Second, there was presented a decision of the highest Court of Kentucky failing to give effect to a Federal Statute. It is to be noted that the Court relied not only upon the legislation of Virginia but also on an Act of Congress passed pursuant to Article IV, Sec. 3, Cl. 1, of the Constitution. The Court said of this Act at page 582:

“* * * But as the consent given by Virginia was conditioned upon the jurisdiction of Kentucky on the Ohio River being concurrent only with the States to be formed on the other side, Congress necessarily assented to and adopted this condition when it assented to the Act in which it was contained. *Green v. Biddle*, 8 Wheat. 1, 87. Thus, after the passage of the two Acts, it stood absolutely enacted by the powers which between them had absolute sovereignty over all the territory concerned that when States should have concurrent jurisdiction on the river with Kentucky. ‘This Compact, by sanction of Congress, has become the law of the Union. What further legislation can be desired for judicial action?’ * * *”

The Congressional Act spoken of was not that contemplated by the provisions of the Compact clause but that provision governing the admission of States under Article IV, Sec. 3, Cl. 1. This clause of the Constitution is not a qualified prohibition as is Article I, Sec. 10, Cl. 3, but a grant of power to Congress to admit new States. The Act of Congress admitting Kentucky as a State became the “law of the Union”. Obviously, in view of the latest decisions of this Court, this is not true of Congressional assent to an interstate Compact procured by the demands of the Compact clause. *Hinderlider v. LaPlata River and Cherry Creek Ditch Co.*, *supra*, at page 109. This Court in *Wedding v. Meyler*, *supra*, was definitely relying on an Act of Congress passed pursuant to Article IV, Sec. 3, Cl. 1 and not passed to conform to the Compact clause. Thus the case can be

disposed of as being completely devoid of any question involving the Compact clause. Third, there was presented for review the construction of a compact by the highest State Court of Kentucky. This view of the jurisdiction is most difficult to uphold. There is nothing in the case to suggest an agreement between the two States. The Compact spoken of by the Court was that formed as the result of the Act of Virginia and the Act of Congress (see p. 582). As to the question of how subsequently admitted States become bound by the Compact and in the case under discussion as to how Kentucky and Indiana became bound by the Compact the Court said at page 583:

“* * * Whether they be said to have it by way of acceptance of an offer, or on the theory of a trust for them, or on the ground that jurisdiction was attached to the land subject to the condition that States should be formed, or by simple legislative fiat, is not a material question, so far as this case is concerned * * *.”

This assertion is to be contrasted with the statement that since both powers (Virginia and Congress) which between them had absolute sovereignty over all the territory concerned, had enacted Statutes, the Acts of both became the law of the Union. Naturally, if this is so it is immaterial to fathom a theory as to why new States should be bound. All States are bound by the law of the Union. It is submitted that either of the first two grounds, full faith and credit, or reliance on the construction of a Statute of Congress passed pursuant to Article IV, Sec. 3, are the sounder grounds of appellate jurisdiction set forth in *Wedding v. Meyler*, *supra*.

C. The cases cited by petitioner do not hold that the interpretation of an interstate Compact standing alone presents a Federal question.

Petitioner cites *Hinderlider v. LaPlata River and Cherry Creek Ditch Co.*, 304 U. S. 92; *Kentucky v. Indiana*, 281 U. S. 163; *Pennsylvania v. Wheeling & Belmont Bridge*

Company, 13 Howard 518; and *Green v. Biddle*, 8 Wheat. 1 as holding that the interpretation of an interstate Compact presents a federal question. These cases are clearly distinguishable and do not so hold.

In *Hinderlider v. LaPlata River and Cherry Creek Ditch Co.*, *supra*, this Court dealt with a decision of a State Court which had held an individual owner was entitled to water in contravention of an interstate Compact. One of the specific contentions urged by appellants at page 93 was that:

"The adjudication of rights under an interstate Compact is a Federal question for ultimate determination by the Supreme Court of the United States."

This Court in dismissing the appeal and allowing certiorari refused to rely on this contention to ground jurisdiction. The federal question as to the apportionment of water of an interstate stream was relied upon in allowing certiorari. In dismissing the appeal this Court said at page 109:

"* * * The assent of Congress to the Compact between Colorado and New Mexico does not make it a 'treaty or statute of the United States' within the meaning of Sec. 237 (a) of the Judicial Code, 28 U. S. C. A., Sec. 344, and no question as to the validity of the consent is presented. *New York v. Central R. R. Co.*, 12 Wall. 455 * * *."

Kentucky v. Indiana, *supra*, dealt with the question of original jurisdiction of this Court. There private citizens as taxpayers had sought to enjoin the defendant State from fulfilling its contract with the complaining State on the ground that the interstate agreement was entered into contrary to the provisions of Indiana law. The attack was as to the validity of the contract. Indiana admitted its obligation to proceed. This Court granted the relief prayed. No such question is here presented. In the case *sub judice* Petitioner relies upon the appellate jurisdiction of this Court. Both parties here admit the validity of the Com-

fact. Appellate jurisdiction is sought to be justified. Original jurisdiction is not the question at issue. This Court was careful to note in its opinion that it had the authority and duty to determine for itself all questions pertaining to an interstate contract "*As to which the original jurisdiction of this Court is invoked.*" (Italics supplied.)

Again, in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, *supra*, while an interstate Compact was involved this Court in taking jurisdiction relied on the Constitutional provision giving it original jurisdiction where a State was a party and had a direct interest in the controversy.

In *Green v. Biddle*, *supra*, the Supreme Court reviewed a lower federal Court decision involving an interstate Compact, the allegation of which, it was alleged, had been impaired by a later Statute. Jurisdiction to review was definitely rested upon the Constitutional prohibition against the impairment of contracts.

While several of these cases have discussed in a general way Compacts and have in several instances referred to Congressional sanction as making a Compact the "law of the Union" such dicta is at variance with actual decisions of this Court.

Hinderlider v. LaPlata River and Cherry Creek Ditch Co., 304 N. S. 92 at 109;

People v. Central Railroad, 12 Wall. 455;

See 35 Columbia Law Review, 76 at 80.

Nor does the contract clause furnish any ground for this Court assuming jurisdiction in the instant case. First, there is some question as to whether, despite *Green v. Biddle*, *supra*, the contract clause governs interstate Compacts. See 35 Columbia Law Review, 76 at 82. Secondly, the constitutional prohibition against the impairment of contracts is limited to statutory conflicts. Here Petitioner's complaint is not that the legislature has enacted a Statute im-

pairing the Compact but that the State Court has interpreted the Compact differently from that contended for by Petitioner. It is well settled that even a change of judicial decision as to the construction of a State Statute does not render the changed construction an impairment of contract obligations entered into upon the faith of the prior construction a legislative change within the prohibitions of the Federal Constitution forbidding legislative impairment of contracts. *Fleming v. Fleming*, 264 U. S. 29. Thus, here Petitioner has no constitutional basis for objecting to a decision of the State Court which is at variance with its own interpretation.

Considering the purpose of the Compact clause of the Constitution; the holding of this Court in *People v. Central Railroad*, *supra*, and the remaining cases dealing with the Compact clause which are readily distinguishable, it is submitted that no federal question is presented. This Court should hesitate before annexing within the sphere of its extensive appellate jurisdiction a class of cases hardly contemplated by the Constitution nor demanded by the precedents in this Court. It is submitted that *People v. Central Railroad*, *supra*, is dispositive.

III

Assuming a Federal question is presented, there is no showing that a Federal question was presented for decision to the Court of Errors and Appeals of New Jersey.

Jurisdiction to review a decision of the highest state court by certiorari in this Court is limited by Sec. 237 of the Judicial Code to three instances: (a) where is drawn in question the validity of a treaty or statute of the United States or (b) where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States or

(c) where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.

Unquestionably there was not drawn in question the validity of a treaty or statute of the United States. For this Court has held that the assent of Congress does not make the compact a federal statute within the meaning of the Judiciary Code.

Hinderlider v. La Plata River and Cherry Creek Ditch Co., 304 U. S. 92;

People v. Central Railroad, 12 Wall 455.

There is no complaint here that the statute constituting the compact is contrary to the Constitution, treaty or laws of the United States. In fact both parties admit the validity of the compact. There is no statute other than the compact which was construed by the Court of Errors and Appeals. Doubtless, the instant case is not within this class.

This leaves only one additional ground justifying appellate jurisdiction. But here jurisdiction is allowed where any title, right, privilege or immunity sought by either party under the Constitution is *specially set up, or claimed*. The record conclusively shows that the so-called Federal question was never presented to the New Jersey Court of Errors and Appeals or to any of the lower courts. The Grounds of Appeal (R., p. 1) reveal no complaint as to the construction of an interstate compact. They merely complain that the lower State Courts had not properly construed New Jersey Statutes. The petitioner for the first time in these proceedings seeks to raise what it terms a Federal question. This it cannot do.

It is elementary that before jurisdiction will be taken by the Supreme Court of the United States, it must be shown

that a Federal question was argued or presented to the Court below for decision, that its decision was necessary to the determination of the cause, and that it was actually decided, or that judgment as rendered could not have been given without deciding it.

Honeyman v. Hanan, 300 U. S. 14;

White River Co. v. Arkansas, 279 U. S. 692 at 700;

Melon v. O'Neil, 275 U. S. 213 at 214;

Young v. Masci, 289 U. S. 253 at 261;

McGoldrick v. Gulf Oil Corp., No. 473, this Term.

The test adopted by this Court demands: first, that the State Court's attention must be called to the Federal question, and secondly, that it must have passed upon the Federal question. For failure to comply with either of these requirements an attempt to seek review in this Court fails. As to the first requirement this Court said in *White River Co. v. Arkansas*, *supra*, at page 700:

"It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the State; and as it was sought to raise this question for the first time by assignments of error in this Court, it is necessarily excluded from our consideration. *Whitney v. California*, *supra*, 316; and cases therein cited."

The demands of both requirements are fully set forth as follows in *Honeyman v. Hanan*, *supra*, at page 18:

"Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause. *Lynch v. New York*, 293 U. S. 52, 54 and cases there cited. Whether these requirements have been

met is itself a Federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the Federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record * * *"

It is submitted that this review must fail—that the writ of certiorari should be dismissed—because the record is absolutely devoid of (1), the setting up of a Federal question or (2), the actual decision by the highest state court of New Jersey of a Federal question.

IV

The respondents are entitled, under the express provisions of the acts creating and governing the Bridge Commission, to compensation for the damage and injury inflicted upon their property by the Bridge Commission.

A. The language of the statutes creating the bridge commission and granting it the power of eminent domain expressly provides for the allowance of consequential damages.

The last paragraph of Article III of the Compact, *supra*, defines what is included in the term "real property" as used in the compact, and compensation for which is, by the earlier paragraphs of the article, to be given. *Included within the term "real property" are "claims for damage to real estate."*

Chapter 297 of the Laws of 1912, as amended by Chapter 76 of the Laws of 1919, now Revised Statutes of 1937, 32:9-6 which by the provisions of Article III of the act creating petitioner governs its exercise of the power of eminent domain, provides in section 2 thereof, that if the Commission cannot agree with an owner as to compensation "the said Commission shall appoint a time not less than

wenty nor more than thirty days therefrom, when they shall meet upon the property and view the same; and the premises affected thereby; and shall give at least ten days' personal notice of the time and place of the first meeting to the Attorney General of this State, and to the president, secretary or director of any corporation, stock company or to any partnership or persons affected * * *" and then continues in section 3 thereof:

"3. The said joint commission having viewed the premises or examined the property, shall hear all parties interested and their witnesses, and shall estimate the value of their property taken, including any easement, rights or franchises incident thereto, *as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable.*"

Every other act dealing with the power of eminent domain in New Jersey provides only for compensation for real property taken. No other act provides as does the act governing the Bridge Commission for viewing by the Commission which is to ascertain compensation, of the "premises affected thereby" as well as the premises taken; no other act includes within the term "real property", "claims for damages to real estate", and no other act requires the commission to value in addition to the property taken, damages for property "injured or destroyed".

Because of the absence of similar statutory provisions in other "eminent domain" statutes found in New Jersey, its courts have held that under those statutes no compensation for injury or damage to property not taken would be awarded. *In each instance, New Jersey courts have stated that had the statute conferred such right to compensation, compensation would be granted.*

Burns Holding Corp. v. State Highway Commission, 8 N. J. Misc. 452, aff'd 108 N. J. L. 401, 150 Atl. 768;

Sommer v. State Highway Commission, 106

N. J. L. 26, 148 Atl. 171;

Wolfson v. Comm. etc. of Perth Amboy, 9 N. J.

Misc. 161, 153 Atl. 106.

In each of these cases, mandamus was sought to compel awards for damages resulting from improvements which affected or injured property although the property affected was not taken. In each, the Court expressed regret in announcing that in the absence of statute the public bodies concerned were not compelled to make compensation. So, in *Burns Holding Corp. v. State Highway*, *supra*, mandamus was sought when the damage alleged was similar to that involved in the case *sub judice*. The Supreme Court of New Jersey said, at page 452:

"Notwithstanding the apparent hardship of the cases, we have to conclude that this rule must be discharged. Counsel for prosecutor cites no authority in this state in support of the rule and while in some other jurisdictions the right to damages is recognized, such judicial opinion as we find in this state is apparently to the contrary, *in the absence of statute conferring the right.*" (Italics supplied.)

The statutory provisions which were absent in the *Burns* case and the other cited cases are, however, as Justice Parker pointed out in the opinion below (R. p. 12) present in the compacts and statutes governing the case *sub judice* and are "plain and controlling" put there because the Constitution of the State of Pennsylvania required compensation for property in that State "taken, injured or destroyed" for public use.

The statute was drawn to comply with that constitutional mandate. The drafters of the compacts and the acts embodying them into law therefore gave to the owners of real property in each state equal rights; the right to compensation for property "taken, injured or destroyed."

The constitutional provision referred to is found in Article 16, section 8 of the Pennsylvania Constitution which provides in part as follows:

"Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for *property taken, injured or destroyed* by the construction, enlargement of their works, highways, and improvements, which compensation shall be paid before such taking, injury or destruction * * *." (Italics supplied.)

Under this constitutional provision, it is well settled that a taking is not a prerequisite to an award for damages caused by a public improvement. The provision was intended for the protection of not only the person whose property was taken, but equally as well for those persons who suffered consequential damages by reason of a public improvement.

Pennsylvania Railroad Co. v. Miller, 132 U. S. 75;
Chester County v. Brower, 117 Pa. 647, 12 Atl.
 577.

In *Chester County v. Brower, supra*, a county was held liable, under the quoted constitutional provision for consequential damages resulting from the erection of bridge abutments adjacent to the premises of the complaining landowner. It was pointed out that, under the law as it stood prior to the adoption of the above constitutional provision, the abutting owner would have been without remedy for such consequential injuries. The Court said:

"The clause in the Constitution above recited is very broad in its terms. The framers of that instrument were seeking to redress what this Court has repeatedly declared to be a great hardship, and which was regarded by many persons as a great wrong, viz. the exemption of corporations from consequential damages where they

injured private property, without an actual taking thereof, in the erection or construction of their works. "The convention had before it the case of *O'Connor v. Pittsburgh* (1851), 18 Pa. 187, in which a valuable property in the City of Pittsburgh was seriously injured by the change of grade of a street. This court held that, as the law then stood, no relief could be afforded. How reluctantly we did so may be gathered from the language of Chief Justice Gibson in delivering the opinion of the Court. He said: 'We have had this cause reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but I grieve to say that we have discovered none. When, therefore, the convention took in hand the redress of this grievance, they did it thoroughly. They said, practically, that hereafter neither corporations or individuals in Pennsylvania clothed with the power of eminent domain, should injure private property without making compensation therefor, by 'the construction or enlargement of their works, highways, or improvements', whether any portion of such private property was actually taken or not. The language of the Constitution is to be construed liberally, so as to carry out, and not defeat, the purpose for which it was adopted."

The words "taken, injured or destroyed" in statutes governing the case *sub judice* are not mere surplusage. They cannot be attributed to error in drafting. They have definite meaning. They permit consequential damages to be recovered, whereas the word "taken" used alone does not permit such recovery.

B. The Pennsylvania courts in interpreting statutes similar to the statute in question have held that the statutes create new rights to consequential damages.

In the first place, it must be recognized that the Pennsylvania cases were not controlling in the New Jersey Courts. There was before the New Jersey Court for the first time a

statute which had not been before interpreted. The Pennsylvania cases may have given some meaning to the words used. But the ultimate decision as to the meaning of the statutes was a question for the New Jersey Court to decide.

Respondent contends that the language of the statute now under construction speaks for itself. The legislative command is set forth in the statute. The words used in the statute should be given their natural and normal meaning. The Commission should be compelled to award damages for property "injured".

But even assuming that the New Jersey Court did consider the Pennsylvania cases as controlling, the interpretation by the Pennsylvania courts of similar statutes requires the interpretation given by the New Jersey Court of Errors and Appeals.

Petitioner, in its brief, asserts that the statutes in this case did not create new legal rights allowing respondents damages for the injury to their property. To support this position a series of disjointed excerpts culled from Pennsylvania reported cases are utilized. Two principal arguments permeate petitioner's discussion and questions. First, it is said that the Courts of Pennsylvania have held that the Pennsylvania constitutional provision allowing compensation for "property taken, injured or destroyed" is nugatory unless the legislature by statute specifically provides a remedy. Even if this proposition is correct, the answer here is that there is a clear and specific statute. Secondly, it is argued that the intent to impose liability for such damages must be incorporated in the title of the act. Obviously, such a test would not bind the New Jersey Courts.

None of the Pennsylvania cases militate against Pennsylvania Courts holding similarly with the New Jersey Court of Errors and Appeals. The holding in *In re Soldiers and Sailors Memorial Bridge, Etc.*, in the City of Harrisburg, 308 Pa. 487, 162 Atl. 309 is that the State in building a bridge is not responsible for consequential damages suffered

by an owner near the proposed bridge. This is true in Pennsylvania because the constitutional provision demanding an award of consequential damages to one whose property is "injured or destroyed" only applies to "municipal or other corporations". The statute empowering the State to build the bridge contained no authorization whatsoever allowing consequential damages. No consent permitting the State to be sued was given. This case is not applicable here where there is a statute allowing such damages, setting up the Commission as a municipal corporation and giving it the power to sue and be sued.

Hoffer v. Reading Co., 287 Pa. 120, 134 Atl. 415, is likewise a case holding that the state is not liable for consequential damages. It is almost identical with the Memorial Bridge Case just discussed.

In *Westmoreland Chemical and Color Co. v. Public Service Commission, et al.*, 294 Pa. 451, 144 Atl. 407, the Supreme Court of Pennsylvania upheld a recovery for consequential damages where the injury was highly similar in kind to those of respondents and where the statute was much the same as in the instant case. There, the state public utility commission ordered that a bridge approach to a new bridge be so built as to eliminate several grade crossings. The approach was a solid concrete wall of a width occupying most of the street and extending along the Westmoreland Chemical and Color Company's property and others as it abutted on the approach. The approach at one end of the plaintiff's property was 6½ feet high, and, at the end nearest the bridge, approximately 17 feet high. Proceedings before the public service commission to determine damages were had. The county appealed to the common pleas, and the jury awarded \$10,000. An appeal was taken to the Supreme Court. The Court held that even though no property was taken, that the existing legislation permitting an award to an owner whose property was "injured" allowed recovery of the damages sustained.

The dicta in both the Westmoreland case and the Memorial Bridge case, just discussed, set forth a doctrine which appellant seeks to urge upon this Court. The excerpts set out that, before the constitutional amendment in Pennsylvania, damages for consequential injuries were not recoverable. It is admitted that thereafter so far as the acts of municipal or other corporations were concerned, one suffering consequential injuries had a recovery. Then, there was a modification. The Courts later said that there would be no recovery unless a statute authorized the recovery. The doctrine propounded is that, though there is a constitutional right to damages in a property owner who suffers consequential injury in Pennsylvania, the Courts will not recognize such a right unless the legislature provides for the right to damages in the statute authorizing the improvement. In other words, the Court by this interpretation seems to override the mandate of the Constitution. By the citation of such authority does appellant propose that this Court likewise nullify the mandate of the legislature that damages shall be awarded for property "taken, *injured* or destroyed"?

Even if such dicta has weight in Pennsylvania, there would be no reason here for its application. No constitutional problem arises here. The fiat of the New Jersey legislature requires damages be awarded for property "injured." All that the Harrisburg Bridge case decided was that there was no statute to compel the state to award consequential damages. Here, however, there is such a statute.

By the citation of the excerpt from The Soldiers' and Sailors' Memorial Bridge case, petitioner may seek to urge another doctrine set forth by way of dicta in that case. It is there said that unless the right to consequential damages was recognized in the title, the statute imposing such liability would be held unconstitutional. Of course, it must be noted that this was said obiter dicta. A reading of the

case shows nowhere that the statute authorizing the building of the bridge by the state authorized the recovery of consequential damages.

Even if such a doctrine prevails in Pennsylvania, there is no reason for its application here. New Jersey has its own constitutional provisions governing the enactment of laws and as to what must be expressed in the title of an act passed by the Legislature. Article 4, Section 7, subdivision 4 of the New Jersey State Constitution provides: "To avoid improper influence which may result from intermixing, in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title * * *." Under this provision of the constitution, it has been held that the title to an act does not require that it be a table of contents, but that if the general object of the statute is expressed, that such an act will be held constitutional.

Gottuso v. Baker, 80 N. J. L. 520, 77 Atl. 1038;
Boniewsky v. Polish Home of Lodi, 103 N. J. L.
 323, 136 Atl. 741.

The New Jersey courts have further held that statutes providing for public improvements must not specifically set out in detail in the title the procedure for making such improvements.

Manufacturers Land and Imp. Co. v. Camden, 81
 N. J. L. 413; 79 Atl. 286.

In the above case, the plaintiff in error prosecuted a writ of certiorari as an adjacent property owner who had been charged with an assessment for street improvements. He complained that the title of the act did not specifically enumerate adjoining property owners as being liable for the cost of the improvement. The Court of Errors and Appeals, at page 414, answered this contention thusly:

"* * * The criticism fails to differentiate between the object of a statute and the means by which that object shall be carried into effect. The former is required to be expressed in the title, the latter is not. As was pithily said by Mr. Justice Garrison in *Moore v. Burdett*, 33 Vroom 164, the constitutional mandate requires that the title of an act shall be a label, not an index. The object of the act under consideration is to improve the public streets of our cities, and to provide for the payment of the expense incurred thereby. This is clearly expressed in the title. The methods to be adopted in making the improvements, and the means by which the moneys shall be raised to pay for them, are mere machinery provided for the accomplishment of the legislative purpose. The statute does not violate the constitutional provision appealed to."

In view of these New Jersey authorities it can hardly be urged the statute giving the Bridge Commission general authority to act should specifically enumerate in its title as to who receives damages in condemnation proceedings.

In *Pennsylvania Railroad v. Lippincott*, 116 Pa. 462, 9 Atl. 871, the third case relied on by petitioner, the essence of the claim sued on was damages caused by the *operation of a railroad*. The complaint sought damages caused by the operation of the railroad. The Court was careful to point out at 116 Pa. 472, 9 Atl. 873, that "it is not alleged that any injury has resulted from the erection of this elevated roadway". Thus, further, the court noted on the same page: "The damage complained of results wholly from the manner in which the roadway is used, results from the noise, smoke and dust arising from the use of the property as a steam railway". Further, at the same point: "It is not pretended that the erection did the plaintiff any harm, but its use only; that is, the running of locomotives on it". The Court merely held in consonance with the prevailing rule that damages cannot be recovered by reason of the lawful operation of a railroad on land in close proximity to an

owner. But the Court did not hold that one whose property is injured by the construction of a railroad or any other improvement cannot recover for damages caused to the property. Deprivation of air, light and view, and lack of access were not elements considered. Respondents' claim of injury is based upon the construction and location of the bridge approach, not the operation of it as a roadway.

Pennsylvania Railroad v. Marchant, 119 Pa. 541, 13 Atl. 690, was identical in facts with the *Railroad v. Lippincott* case, arising out of the same viaduct operations. Likewise, being based on a complaint for damages from the lawful operation of a railroad, it has no bearing in a case such as the instant one where the claim is predicated on damages caused by the construction of the bridge approach.

The distinction just discussed is noted in subsequent cases dealing with *Pennsylvania Railroad Co. v. Lippincott* and *Pennsylvania Railroad Co. v. Marchant*. It was thus said in *Pennsylvania S. V. R. Co. v. Walsh*, 124 Pa. 544, at 558; 17 Atl. 186, at 187:

“ * * * Our latest case is *Penna. Railroad Company v. Marchant*, 119 Pa. 541, in which it was held that the word ‘injury’ or (injured) as used in sec. 8 article XVI of the constitution, means such legal wrong as would be the subject of an action for damages at common law; that for such injuries both corporations and individuals now stand upon the same plane of responsibility. In that case, as in the prior case of *Railroad Company v. Lippincott*, 116 Pa. 472, there was no injury to the property by reason of the erection and construction of the road, and we held that the constitutional provision was not intended to apply to injuries which were the result merely of the road, as distinguished from its construction; and that in such case there could be no recovery for the annoyance of smoke, noise and cinders, etc., caused by the running of the company’s trains, unaccompanied with negligence; in other words, that the injuries resulting from the exercise of a lawful business, in a lawful manner, without negligence and

without malice, are damnum absque injuria. We cannot, however, apply that rule to this case for obvious reasons.

"In *Railroad Company v. Lippincott*, and *Railroad Company v. Marchant*, supra, as in this case, there was no actual taking of any portion of the plaintiff's property. But there the analogy ceases. In the cases cited, there was no injury by reason of the construction of the road; here there was an injury and a serious one, the direct result of the construction." (Italics supplied.)

That the Pennsylvania constitution and statutes created new rights is most forcefully illustrated by the last Pennsylvania case cited by petitioner.

In *Holmes & Holmes v. Public Service Commission*, 79 Pa. Super. Court, 381 at 386, this point is made in the following excerpts:

"* * * The constitution of Pennsylvania, article XVI, sect. 8, provides that 'municipal and other corporations and individuals invested with privilege of taking private property for such use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highway or improvements'. The Supreme Court held that this provision of the Constitution is not limited to property merely fronting or abutting on the particular works, highway or improvement by the construction of which the property is injured or destroyed but applies to any works which are sufficiently near to the property to make the injury proximate, immediate and substantial. *Melor v. Philadelphia*, 160 Pa. 614; *Chatham Street*, 191 Pa. 604." (Italics supplied.)

It was further said at page 386 as to including the word adjacent in the statute awarding damages rather than abutting:

"* * * It is apparent, therefore, that the Public Service Company Act made no change in the law on this point;

but simply recognized that adjacent property,—which includes abutting property,—might be injured by the construction, relocation, alteration, or abolition of a grade/crossing and made provision accordingly. *Had the act limited the right to damages of abutting property it would, under the decisions above cited, have been unconstitutional in that respect. * * ** (Italics supplied.)

Respondents have reviewed at length the decisions cited by petitioner to demonstrate the fallacy of petitioner's argument that the Pennsylvania constitution and statutes similar to that in the instant case create no new legal rights. The very cases cited by petitioner show that the Pennsylvania Courts have recognized the constitutional provision and similar statutes as creating new rights. These rights are not limited to the extent of common law rights existing before the passage of the constitutional provision or statutory legislation allowing awards for property damaged.

The Pennsylvania courts in interpreting the constitutional provision and legislation thereunder allowing damages to property injured by an improvement have consistently held that new rights are created in favor of owners who suffer diminution in value of their property irrespective of their location with reference to the improvement.

Mellor v. Philadelphia, 160 Pa. 614, 28 Atl. 991;

Bodemer v. County of Northampton, 101 Pa. Super. Ct. 492;

In re Melon Street, 182 Pa. 397, 38 Atl. 482;

In re Construction of Walnut St. Bridge, Appeal of the City of Philadelphia, 191 Pa. 153, 43 Atl. 88;

Chatham Street, Philadelphia's Appeal, 191 Pa. 604; 43 Atl. 365;

Lewis v. Homestead, 194 Pa. 199, 45 Atl. 123.

In *Mellor v. Philadelphia*, 160 Pa. 614, 28 Atl. 991, plaintiffs sued the defendant municipality for damages suffered

depressing streets which connected with the street on which they fronted. On appeal, a judgment in their favor was upheld. The appellant contended that the constitutional provision was not applicable to any other owner than an abutting owner. The court, at page 621, said as to this contention:

"The respective claims of the plaintiff to compensation were based on the constitutional provision that 'municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements'. Const., art. 16, sect. 8. * * * *There is nothing in the phraseology of the section that can be even tortured into a limitation of its provisions to property fronting or abutting on the particular work, highway or improvement, by the construction or enlargement of which said property was injured or destroyed. The section in question cannot be thus narrowly construed without reading into it words which are not in it and were never intended to be there.*" (Italics supplied.)

In *Bodemer v. County of Northampton*, 101 Pa. Superior 492, plaintiff was the owner of land on which was located a hotel and filling station bordering on a highway. The highway was relocated in 1929 to abolish certain railroad crossings a distance of some 700 feet from the old highway, and plaintiff's property, rendering plaintiff's property less accessible. The Public Service Commission sued for an award. On appeal the amount was reduced in the Common Pleas. From that court, there was an appeal to the Superior Court. The Appellate Court upheld the award, saying at page 497:

"A review of the evidence satisfies us that it is sufficient to support a finding that the plaintiff in the proceedings abolishing the grade crossings in question suf-

ferred injury to his property rights by being shut off from direct access to the highways to Easton, which were special and peculiar to himself and different in kind from the injury sustained by the public using the road only for travel; and that his property through which the road affected passed, was sufficiently near to the public works in question to make the injury proximate, immediate and substantial."

The Court after discussing the leading cases in Pennsylvania, said at page 496:

"* * * They hold that where there is legislative warrant for a recovery of consequential damages, the constitutional provision (Art. XVI, sec. 8) is not limited to abutting landowners, but includes anyone who can show an injury to his property rights peculiar to himself and different in kind from the injury sustained by those who use the road for travel only; provided the property is sufficiently near to make the injury proximate, immediate and substantial."

In *re Melon Street*, 182 Pa. 397, 38 Atl. 482, was a proceeding for the assessment of damage by adjacent owners against the City of Philadelphia for vacation of streets on which complainant's property did not abut. The vacation of the streets caused a deprivation of direct access to the east of the claimant's property.

The Court pointed out that the property owners were deprived of direct access to the system of streets to the east, that their property was depreciated in value. The Court held that even though they were not abutting owners, they were entitled to recover damages for the diminution in value of their property. The ratio decidendi was set forth at 38 Atl., page 489:

"The difficulty in defining the limits where the right to compensation shall end cannot be urged as a valid objection to the claims of appellants. To entitle the

owner of land to recover the loss must be one which he as owner has suffered by reason of the depreciation in value of his land. The basis of his claim for compensation is that his land has been lessened in value, not that he has suffered in common with others or to a greater extent than others because of something peculiar to himself. The difficulty in assessing damages is no greater than that which a jury meets in all such cases in ascertaining the extent to which properties in the vicinity have been benefited and in making assessment therefor. To sustain the right of a claimant to compensation because of the vacation of a street it must appear that the loss results from the depreciation in value of his land because of the change in the street, and his loss must be direct and proximate, and so obvious and substantial to admit of calculation." (Italics supplied.)

In *Chatham Street-Philadelphia's Appeal*, 191 Pa. 604, 43 Atl. 365, petitioner sought damages from a change in grade of a street other than the one on which his property abutted. The Court held that the act allowing damages and the constitutional provision was not limited to abutting owners. It was said at 43 Atl., page 365:

"There cannot be any question as to his legal right to compensation and we cannot say that the amount awarded him is excessive. As to his legal rights, etc., it is unnecessary to do more than refer to sec. 8 of article 16 of the constitution and the act under which this proceeding was had. The constitutional provision is not limited to property abutting or fronting on the particular highway or improvement, by the construction or enlargement of which the property is injured. It applies to any works, etc., ~~that are sufficiently near~~ to the property to make the injury proximate, immediate and substantial (citations omitted)."

- C. The authorities recognize that statutes providing for damages for "property taken, injured or destroyed" apply to all classes of property which is depreciated in value by reason of the improvement.

Lewis on Eminent Domain (3 ed.) Vol. 1, secs. 359, 360 and 354;

Nicholas on Eminent Domain, Vol. 1, p. 324.

As to the manner in which words in statutes providing for damages for property injured or destroyed are to be interpreted, Lewis on Eminent Domain, *supra*, at page 644, says:

"Sec. 359: There can be no doubt but what the words in question were intended to enlarge the right to compensation. Any other construction would render the words nugatory. They are 'an extension of the common provision for the protection of private property'. 'The words, injured or destroyed, were not used in vain and without meaning. It was intended that they should have effect, and unless they operate to impose a liability not previously existing, they are without operation'. • • •"

"Sec. 360: The provision of the constitution requiring compensation to be made for property taken, injured or damaged for public use, are intended for the protection of private rights. They are remedial in character. They should, therefore, be liberally construed in favor of the individual whose property is affected, and the authorities so hold. The language of the constitution is to be construed liberally so as to carry out and not defeat the purpose for which it was adopted'."

V

The New Jersey Act of 1912, as amended, was the exclusive method prescribed for exercising the general power of eminent domain granted the Commission by the compact.

Petitioner has labored a construction of the Compact in an endeavor to show that the 1912 Act, as amended, was only an alternative method of exercising eminent domain. But if this is an alternative method as suggested there is no showing by petitioner of where the Compact prescribed the first method as to which this is an alternative. Petitioner sought to make a similar point in the New Jersey Supreme Court (R. p. 13). It abandoned the point in the Court of Errors and Appeals. No such contention is set forth in the Ground of Appeal (R. p. 1) prepared for the New Jersey Court of Errors and Appeals.

The essence of petitioner's argument is that the 1912 Act, as amended, was originally intended to be used to acquire toll bridges and that therefore it could not be enlarged to include the instant case. The obvious answer is that the legislatures of both States specifically provided that this act should be used in acquiring New Jersey property and as they prescribed no other method this is the exclusive manner in which the Bridge Commission is to award "damages" for property "injured".

It is submitted that there is no alternative method defined and that the Act of 1912 as amended is the exclusive method which the Bridge Commission is to pursue.

Conclusion

The writ of certiorari should be dismissed for lack of jurisdiction or if this Court decides it has jurisdiction the decision of the New Jersey Court of Errors and Appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 563.—OCTOBER TERM, 1939.

Delaware River Joint Toll Bridge Commission, Pennsylvania-New Jersey,
Petitioner,

vs.

John D. Colburn and Bessie Colburn.

On Writ of Certiorari to
the Court of Errors and
Appeals of the State of
New Jersey.

[May 27, 1940.]

Mr. Justice STONE delivered the opinion of the Court.

The question is of the right of respondents to recover consequential damages to their New Jersey land, due to interference with their access to the land and with their light, air and view caused by petitioner's construction of a bridge abutment on adjacent land. The answer turns on the question whether the Compact of 1934 between New Jersey and Pennsylvania authorizing the construction of the bridge and its approaches, excluded the application to petitioner of a New Jersey statute without which respondents would enjoy no right of recovery under New Jersey law.

Petitioner, the Bridge Commission, is a "body corporate and politic" created by the Compact adopted by the legislatures of the two states, N. J. P. L. 1934, Ch. 215 (now N. J. R. S. 1937, 32: 8-1 *et seq.*), 1931 Pa. P. L. 1352; 1933 Pa. P. L. 827, and consented to by Congress, 49 Stat. 1058 (1935). The Compact authorized the Commission to build bridges across the Delaware River between the two states, and for that purpose gave the Commission authority to acquire real property by purchase or by the exercise of eminent domain. The Commission, in the exercise of its authority in construction of a bridge between Phillipsburg, New Jersey and Easton, Pennsylvania, acquired by purchase land in the town of Phillipsburg, upon which it has located and constructed a highway approach to the bridge, on an embankment or abutment leading to the New Jersey end of the bridge. The property thus acquired and used includes land adjoining the rear of property owned

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by respondents, having its front on a public street. The embankment and the land on which it rests also crosses certain streets in the neighborhood not immediately adjacent to respondents' land which have been permanently closed by the public authorities, in order to provide for the bridge approach.

The present suit is a proceeding in mandamus, brought in the New Jersey Supreme Court to compel the Commission to take proceedings, which it is alleged are authorized and required by the Compact, to fix and award compensation to respondents for damages to their land, suffered by reason of the Commission's action in the construction of the abutment. The State Supreme Court sustained the special verdict of a jury which found that the Commission's action had damaged respondents by depriving them of access to their land and their enjoyment of light, air and view. The court found as a matter of law that as the abutment was located wholly on land acquired by the Commission, and as the streets in the neighborhood had been closed and grades changed by state authority, respondents were without right of recovery for the damages suffered, in the absence of some statute authorizing recovery. But it found such a statute in Ch. 297 of P. L. 1912 as amended by Ch. 76 of P. L. 1919 (now N. J. R. S. 1937, 32:9-1 *et seq.*), which is construed with the Compact as requiring the Commission to compensate for the damages which respondents had suffered. 119 N. J. L. 600.

Respondents, being without other adequate legal remedy, the court awarded a peremptory mandamus directing petitioner to compensate them for the damage or to take proceedings for the determination of the amount to be awarded as compensation pursuant to the provisions of Article III of the Compact, which it also held required the proceedings for that purpose to be taken according to Chapter 297 of P. L. 1912 as amended by Ch. 76 of P. L. 1919 (now N. J. R. S. 1937, 32:9-1 *et seq.*). On appeal the New Jersey Court of Errors and Appeals affirmed on the same grounds as those on which the Supreme Court rested its decision. 123 N. J. L. 197. We granted certiorari January 15, 1940, the questions of the construction of the Compact between states and of the jurisdiction of this Court being of public importance.

In *People v. Central Railroad*, 12 Wall. 455, jurisdiction of this Court to review a judgment of a state court construing a compact

between states was denied on the ground that the Compact was not a statute of the United States and that the construction of the Act of Congress giving consent was in no way drawn in question, nor was any right set up under it. This case has long been doubted, see *Hinderlider v. La Plata Co.*, 304 U. S. 92, 110, note 12; and we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal "title, right, privilege or immunity" which when "specially set up and claimed" in a state court may be reviewed here on certiorari under § 237(b) of the Judicial Code, 28 U. S. C. § 344. See *Green v. Biddle*, 8 Wheat. 1; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518; *Wedding v. Meyler*, 192 U. S. 573; cf. *Wharton v. Wise*, 153 U. S. 155; *Kentucky Union Co. v. Kentucky*, 219 U. S. 140, 161; *Hinderlider v. La Plata Co.*, *supra*. Hence we address ourselves to the language of the Compact on which respondents rely to sustain a right of recovery for injury to their lands, for which, apart from the New Jersey statute of 1912, referred to in the Compact, the New Jersey courts have held there is no support in state law.

The Compact created the Commission as a "public corporate instrumentality" of the two states, to perform state functions, among others, the location, construction, operation and maintenance of bridges extending between the two states and across a specified section of the Delaware River. To this end it conferred upon the Commission the power:

- (b) To sue and be sued;
- (h) To enter into contracts;
- (j) To acquire, own, use, lease, operate and dispose of real property and interests in real property, and to make improvements thereon; and
- (m) To exercise the power of eminent domain."

In connection with the acquisition of any real property for any authorized purpose, Article III of the Compact provides:

"If the commission is unable to agree with the owner or owners thereof upon terms for the acquisition of any such real property, in the State of New Jersey, for any reason whatsoever, then the commission may acquire such property by the exercise of the right of eminent domain, in the manner provided by the act of the State of New Jersey, entitled 'An Act authorizing the acquisition and maintaining by the State of New Jersey, in conjunction with the State of

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Pennsylvania, of toll bridges across the Delaware River; and providing for free travel across the same,' approved the first day of April, one thousand nine hundred and twelve (Chapter, two hundred ninety-seven), and the various acts amendatory thereof and supplementary thereto, relating to the acquisition of inter-State toll bridges over the Delaware River."

It further provides:

"The term 'real property,' as used in this compact, includes lands, and interests in land, and any and all things and rights usually included within the said term, and includes not only fees simple and absolute but also any and all lesser interests, such as easements, rights of way, uses, leases, licenses, and all other incorporeal hereditaments, and every estate, interest or right, legal or equitable, including terms of years and liens thereon by way of judgments, mortgages, or otherwise, and also claims for damage to real estate."

It will be noted that the effect of these provisions is to authorize the Commission to acquire "real property" by purchase or by eminent domain, and that by definition real property includes "interests in land" which are so defined as to include "claims for damage to real estate", and that where resort to eminent domain is needful for the acquisition of such interests, the exercise of that power is to be "in the manner provided" in the New Jersey statute of 1912 as amended. By its terms the Compact confers upon the Commission the power to acquire the specified interests in land or relating to land, conditioned upon payment for the interests acquired, an amount agreed upon or fixed by "proceedings in eminent domain." Beyond this it imposes no duty or obligation on the Commission to compensate for damages inflicted by its acts, but leaves the Commission subject to such liability as is imposed by the law of the state within which the Commission acts.

The New Jersey statute of 1912 which, as prescribed by Article III of the Compact affords the procedure by which the Commission is to exercise its power of eminent domain, does not enlarge the duties or liability of the Commission as prescribed by the Compact. The amended statute of 1912 authorized a state commission, acting in cooperation with a like commission of Pennsylvania, to acquire the rights, franchises and property of bridge companies owning and operating existing toll bridges across the Delaware River within specified territory and to operate and maintain them as free bridges.

It authorized the Commission to acquire the bridges by purchase or by eminent domain and for that purpose "to determine the compensation to be allowed as of the time of entry upon the property and taking possession thereof for the value of property, franchises, easements or rights in the two states." It commands that after view of the premises and hearing the Commission, in determining the amount of compensation, "shall estimate the value of the property taken, including any easement, rights or franchises incident thereto, as well as the damages for property taken, injured or destroyed, and shall state to whom the damages are payable."

Respondents insist that this direction that the commission created under the 1912 Act "shall estimate . . . damages to property taken, injured or destroyed" is, by the Compact, made a direction to petitioner for payment of consequential injuries to property to which the Compact makes no reference. Under the generally applicable decisions and statutes of New Jersey, as her courts have held in this case, the Commission is without liability to pay consequential damages. But it found a statutory creation of such liability in the Act of 1912 as amended in 1919. At the time of the adoption of the Compact there was no statute in New Jersey purporting to impose such a liability which was on its face applicable to the Commission. If the Act of 1912 as amended imposed such a liability, it appeared to be applicable only to a different corporate body from petitioner and then only in the case of the transfer of ownership of existing toll bridges to the commission the acquisition of which could inflict no consequential damages. In entering into a compact it was then competent for the states to provide by its terms the extent to which they were to take over and apply to the new Commission, performing a different function under different circumstances, the substantive rules governing compensation upon the acquisition of existing toll bridges under the 1912 Act. The Compact was explicit in its specifications of what property interests should be taken and compensated for, and of the right and authority of the Commission to acquire them by purchase or by eminent domain. By its silence it left the Commission subject to such liability for consequential damages only as was imposed by the laws of the state, including the Act of 1912, except in so far as the Compact restricted the application of that Act. The Compact was equally explicit in its statement of the effect which was to be given to the 1912 Act and its amendments.

It is plain that, under the Compact, without reference to that legislation, the Commission could have acquired land by purchase and built a bridge upon it without subjecting itself to liability for consequential damages. But it was necessary that a procedure should be adopted for the exercise of the power of eminent domain conferred on the Commission by the Compact and this was done by the provision of the Compact that "the Commission may acquire such property by the exercise of the right of eminent domain, in the manner provided" by the 1912 Act. Under the Compact that Act is given effect only to the extent that it affords a manner or procedure of exercising the right of eminent domain, which is called into operation only if the Commission is unable to acquire needed property by purchase and then only as a means of fixing the compensation which, under the Compact, the Commission is required to pay. The Compact can be given a more extensive effect only by disregarding its language and by attributing to its draftsmen an intention to adopt a rule of damages not generally applicable in the state and now for the first time adopted by a construction plainly inapplicable to the acquisition of existing toll bridges to which the Act of 1912 and its amendments alone referred.

Only by reading into the words of the Compact such a strained and unnatural meaning, is it possible to find in it a modification of the settled law of the state defining the recoverable damages upon the construction of public works. Nothing in the history of the Compact has been brought to our attention to suggest any reason or purpose for such modification in the special case of bridges to be constructed between the two states. Both the New Jersey courts thought they discerned such a reason in Article XVI, § 8 of the Pennsylvania constitution of 1872, which provides: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements . . ." In passing upon this case they thought that this provision of the Pennsylvania constitution as construed by two decisions of the Pennsylvania Supreme Court in 1888 and 1889, *Chester County v. Brower*, 117 Pa. 647; *Appeal of Delaware County*, 119 Pa. 159, required compensation for consequential damages in eminent domain proceedings.

From this they reasoned that by the provisions of the Compact for the acquisition of property by eminent domain proceedings "in the manner" provided by the 1912 Act with its stipulation for payment of "damages for property taken, injured or destroyed" it was intended by the Compact to make the rule of damage under the Pennsylvania constitution applicable to property similarly acquired by the Commission in New Jersey. But this reasoning overlooks the important circumstance that the Pennsylvania courts have consistently ruled that the constitutional provision is without application where there is no taking by eminent domain, and that municipal corporations or others, although possessed of the power of eminent domain, are not liable for consequential damages inflicted by the erection of structures wholly on their own land acquired by purchase. *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541; *Hartman v. Pittsburgh Incline Plane Co.*, 159 Pa. 442; *Gillespie v. Buffalo, Rochester & Pittsburgh Ry. Co.*, 226 Pa. 31; *Ridgeway v. Philadelphia & Reading Ry. Co.* 244 Pa. 282.

Moreover, in 1928, six years before the Compact, the Supreme Court of Pennsylvania, in *Westmoreland Chemical & Color Co. v. Public Service Commission*, 294 Pa. 451, departed from its ruling in *Chester County v. Brower*, *supra* and *Appeal of Delaware County*, *supra*, and has since held that the constitutional provision in the absence of a statute requiring it gives no right of recovery from a landowner for consequential damages resulting from structures located wholly on his own land whether acquired by purchase or eminent domain. *Hoffer v. Reading Co.*, 287 Pa. 120; *Soldiers and Sailors Memorial Bridge*, 308 Pa. 487, 491; *McGarrity v. Commonwealth*, 311 Pa. 436, 439.

Even though it be thought that it was intended to adopt, by the 1912 Act, the then prevailing interpretation of the Pennsylvania constitutional provision, that fact could have no force here, both because the constitutional provision has never been regarded by the Pennsylvania courts as applicable to the use of land acquired by purchase and because the Compact by its terms excludes the 1912 Act from its operation except in so far as it affords a manner or method of procedure when the Commission resorts to eminent domain.